

Legislative Council Panel on Security

Results of study of matters raised in the Annual Report 2014 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance

Purpose

Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance (the ICSO), the Commissioner on Interception of Communications and Surveillance (the Commissioner) submitted his Annual Report 2014 (the Report) to the Chief Executive in June 2015. This note sets out the Administration's views on the matters raised in the Report.

Background

2. Interception of communications and covert surveillance operations are critical to the capability of our law enforcement agencies (LEAs) in combating serious crimes and protecting public security. The ICSO, enacted in August 2006, provides a statutory regime for the conduct of interception of communications and covert surveillance by the LEAs. The Commissioner, appointed by the Chief Executive on the recommendation of the Chief Justice pursuant to section 39 of the ICSO, is responsible for overseeing the compliance by the LEAs with the relevant requirements of the ICSO.

3. The Report covers the period from 1 January 2014 to 31 December 2014 (the report period). The Chief Executive has caused a copy of the Report to be laid on the table of the Legislative Council on 25 November 2015.

4. The Security Bureau, in consultation with the LEAs concerned, has studied the matters raised in the Report.

General Observations

5. The ICSO provides a statutory framework for the conduct of interception of communications and covert surveillance that aims to strike a balance between the need for prevention and detection of serious crimes and the protection of public security on the one hand and the need for safeguarding the privacy and other rights of individuals on the other. It provides a stringent regime with checks and balance to ensure that the LEAs' covert operations are carried out in accordance with the requirements of the ICSO.

6. During the report period, interception of communications and covert surveillance operations carried out by the LEAs continued to be subject to the tight regulation of the statutory framework under the ICSO. The LEAs, panel judges, and relevant parties provided the support and cooperation that the Commissioner needed to perform his oversight and review functions under the ICSO. On the whole, the Commissioner was generally satisfied with the performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2014.

7. The Commissioner observed that the LEAs continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. Besides, the LEAs did recognise the importance of protecting information which might be subject to legal professional privilege (LPP) or journalistic material, and continued to adopt a very cautious approach in handling these cases. The Commissioner also observed that the panel judges handled the applications carefully and applied stringent control over the duration of the authorisations. In addition, the panel judges continued to be very cautious in dealing with cases that might possibly involve LPP information being obtained by an LEA. When it was assessed that there was such a likelihood and if they granted the authorization or allowed it to continue, they would impose additional conditions. These additional conditions were stringent and effective in safeguarding the right of individuals to confidential legal advice.

The Commissioner's Findings

8. Under section 54 of the ICSO, where the head of an LEA considers that there may have been any case of failure by the LEA or any of its officers to comply with any relevant requirement of the ICSO, he shall submit to the Commissioner a report with details of the case. Apart from the requirements of section 54, the LEAs are also required to report cases of irregularities or even simply incidents to the Commissioner for his consideration and scrutiny. The Commissioner stated in Chapter 6 of the Report that he received from the LEAs reports of non-compliance/irregularities/incidents relating to 12 ICSO cases during the report period. There was one non-compliance case resulting in unauthorized interception of an individual's facility for about four days. The Commissioner was disappointed by the performance of the officers concerned, whose mistakes ranged from ineffectual verification of a facility before making the application for interception to inclusion of misleading information in the affirmation. The Commissioner has asked for a further investigation to ascertain clearly whether the above-mentioned non-compliance was the consequence of inadvertent/careless mistakes or otherwise; and the review of this further investigation had not yet been completed at the time of the Commissioner's compiling the annual report.

9. As stated by the Commissioner, there was no finding that any of the other cases of irregularities/incidents were due to deliberate disregard of the statutory provisions, the Code of Practice or the control of surveillance devices. There was no sign of abuse of surveillance devices for any unauthorized purposes during the report period. Noting that there were occasions where officers were careless in preparing and processing ICSO materials, the Commissioner highlighted the need for constant vigilance at all levels in the LEAs so as to ensure strict compliance with the requirements of the legislation.

The Commissioner's Recommendations to the Administration

10. Under sections 51 and 52 of the ICSO, the Commissioner may make recommendations to the Secretary for Security and the heads of the LEAs as and when necessary. During the report period, the Commissioner continued to give advice and recommendations on various procedural matters in the course of overseeing the LEAs' compliance with the requirements of the ICSO. The Commissioner's recommendations are summarised in Chapter 7 of the Report and are all accepted by the LEAs concerned. The key recommendations made by the Commissioner in the report period and the response of the Administration are set out at **Annex**.

Conclusion

11. The control regime under the ICSO has continued to operate smoothly during the report period. The Administration will continue to closely monitor the operation of the regime, and fully co-operate with the Commissioner and the panel judges, with a view to better carrying out the objects of the ICSO.

12. As noted by the Commissioner in the Report, the Interception of Communications and Surveillance (Amendment) Bill 2015 (the Amendment Bill) has been introduced into the Legislative Council. It aims to make legislative amendments to the ICSO to implement the first Commissioner's recommendations that have been agreed by the Administration, so as to strengthen the power of the panel judges and the Commissioner as well as to enhance the clarity of a number of provisions in the Ordinance. The Administration shares with the Commissioner's hope that the Amendment Bill would be enacted as soon as possible so as to bring the new proposals thereunder to early implementation.

**Response of the Administration
to the key comments and recommendations made in the Annual Report 2014
of the Commissioner on Interception of Communications and Surveillance (the Commissioner)**

| | Comments and recommendations made by the Commissioner to the LEAs | The Administration's response |
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| 1. | <i>Information included in a discontinuance report (paragraph 7.2(a))</i> | |
| | To give the panel judge a full picture of all the interception operations on the same subject in preparing discontinuance reports for interception. | <ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the relevant LEAs. |
| 2. | <i>Written guidelines on the arrangements for safeguards against protected products (paragraph 7.2(b))</i> | |
| | For an LEA, to put in place written guidelines on the existing arrangements which ensured compliance with the requirements for safeguards against protected products. | <ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEA concerned. |

| | Comments and recommendations made by the Commissioner to the LEAs | The Administration's response |
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| 3. | <i>Automatic notification system for the arrest of the subject (paragraph 7.2(c))</i> | |
| | To improve the current manual checking system and, for an LEA, to develop an automatic notification system for the arrest of subjects such that the interception units can, as soon as reasonably practicable, be notified of the arrest of the subject of an interception. | <ul style="list-style-type: none">● Recommendation accepted. The recommendation is being implemented by the LEA concerned. |
| 4. | <i>Storage of surveillance devices pending disposal (paragraph 7.2(d))</i> | |
| | Surveillance devices should be suitably labelled and properly stored in a secured place pending disposal. | <ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs. |
| 5. | <i>Evidence of destruction of surveillance devices (paragraph 7.2(e))</i> | |
| | To provide evidence for the Commissioner to verify whether a surveillance device had been destroyed properly. | <ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs. |

| | Comments and recommendations made by the Commissioner to the LEAs | The Administration's response |
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| 6. | <i>Uniform practices for preparing Review Form for review by the Reviewing Officer of the LEA (paragraph 7.2(f))</i> | |
| | To adopt uniform practices within an LEA for preparing the Review Form. | <ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs. |
| 7. | <i>Information included in the Review Form for review by the Reviewing Officer of the LEA (paragraphs 3.24(b) and 7.2(g))</i> | |
| | To mention and explain in the Review Form all relevant matters, including late return of surveillance devices to device stores and suspension of monitoring of surveillance operations, for the attention of the Reviewing Officer so that he could assess whether there were any irregularities or areas for improvement. | <ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs. |

| | Comments and recommendations made by the Commissioner to the LEAs | The Administration's response |
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| 8. | <i>Timely revocation of a prescribed authorization (paragraphs 3.24(a) and 7.2(h))</i> | |
| | For an LEA, to put in place a new arrangement to prevent late revocation of a prescribed authorization arising from the absence of an authorizing officer. | <ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEA concerned. |
| 9. | <i>Comprehensive information in application for Type 2 surveillance (paragraph 7.2(i))</i> | |
| | Officers applying for an authorization for Type 2 surveillance should provide sufficient and comprehensive information for the consideration of the authorizing officer. | <ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs. |